STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of NORMAN H. HEINZ, Deceased.

DUANE HEINZ and DIANE CHAMBERS,

Petitioners-Appellants,

v

DAVID HEINZ,

Respondent-Appellee.

UNPUBLISHED
February 13, 2007

No. 264155
Oscoda Probate Court
LC No. 03-003568-DE

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Petitioners appeal as of right from the probate court's judgment admitting decedent's will to probate, which was entered following a jury verdict finding that the decedent had testamentary capacity to execute the will. We affirm.

I. FACTS

In 1984, petitioner Diane Chambers purchased property in Oscoda County with her parents. Chambers testified that she never used the property and purchased it with her parents solely to help them. In 1986, petitioner Duane Heinz moved a mobile home onto the property for his parents to live in and moved in later that year and cared for his parents. The decedent had Parkinson's disease and his wife suffered from Multiple Sclerosis.

In 1992, the decedent and his wife moved in with Chambers in California, so she could help care for them, and petitioner Duane Heinz continued to live on the Michigan property. While living in California, the decedent would often return to his home in Michigan or stay with the respondent and his wife. During one visit, he allegedly asked the respondent to set up an appointment for him with an attorney. The respondent set up the appointment, drove the decedent to the attorney's office, and waited outside while his father spoke with the attorney, Sally Galer.

Decedent's wife passed away in December 1999, and Chambers continued to handle her father's finances. In June 2001, the decedent returned to Michigan, and he stayed with the respondent and his wife. During this visit, decedent asked respondent to make another

appointment with Galer to make a will. Once again, respondent set up and drove the decedent to the appointment, and then drove decedent back to the office to sign the will on October 17, 2001. The decedent also executed a quitclaim deed at the attorney's office when he executed the will, which transferred his interest in the Oscoda property to himself and the respondent as joint tenants with right of survivorship. The will left everything to respondent and expressly left nothing to petitioners. Respondent stated that he never discussed the terms of the will with the decedent or saw the will before the decedent's death.

On December 19, 2001, the decedent was admitted into a nursing home. Petitioners claim that decedent was "declared incompetent by his attending physicians to handle his personal and financial affairs in December 2001." Petitioners also allege that Galer brought another quitclaim deed to the decedent at the nursing home after he was declared incompetent. This deed quitclaimed to respondent alone all of the decedent's interest in real property that the decedent apparently owned by himself in St. Clair County. The decedent died on October 27, 2002.

Respondent then brought a petition for informal probate, but the petitioners challenged the will, arguing that the decedent lacked testamentary capacity to execute the will and that the will was the product of undue influence, fraud, and duress. The petitioners requested that the court set aside the will and rule that the decedent died intestate, that the court compel the respondent to provide an accounting, and that the court enjoin the respondent from transferring any estate assets.

At trial, the probate court denied petitioners' request to admit medical records from California doctors, as well as opinion letters from those doctors, ruling that the respondent had no opportunity to cross-examine the doctors who prepared the records or letters and that the documents were not timely presented. Petitioners also argued that the various deeds should be admitted because although the jury would not decide whether the deeds were valid, as that was an equitable issue for the court, they would be relevant as to whether the decedent understood the estate planning package, of which the deeds were a part. The trial court denied petitioners' request to admit the deeds, ruling that the effect of the deeds and the requested injunction were equitable concerns for the court and were not issues for the jury.

Petitioners' expert witness, Dr. Williams, treated the decedent after he was admitted to a nursing home following a suspected, but unconfirmed, stroke. Williams agreed that as of December 26, 2001, he and another physician determined the decedent was incompetent, and that the decedent's mental and physical condition had been declining over many years. However, Galer testified that on October 17, 2001, decedent appeared to be competent because he knew who he was, who his children were, what he had, where he lived, and understood that if he took no action, his assets would be divided equally between his children. She noted that the decedent discussed the terms of the will with her and originally considered leaving 5% of his estate to Chambers, 10% to Duane, and the remainder to David, but ultimately decided to leave his entire estate to David. Galer did not believe that the decedent was under any influence because he had "struggl[ed] with the percentages" instead of opting immediately to leave everything to David, and he did not have David in the room while discussing the will.

Following trial, the jury found that the will did not result from undue influence and that the decedent had the mental capacity to make the will.

II. ADMISSIBILITY OF EVIDENCE

Petitioners first argue that the trial court erred in failing to admit at trial certain medical records and letters coming from California physicians who had treated the decedent, as well as certain property deeds executed by the decedent. We disagree with plaintiffs' contentions.

A. Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

B. Analysis

The medical records and letters meet the definition of hearsay under MRE 801(c) because they contain out-of-court written assertions "offered in evidence to prove the truth of the matter asserted." Specifically, petitioners seek to establish through these documents that the decedent suffered certain cognitive problems referenced within these documents, and thereby show that he lacked testamentary capacity to make and execute his will. Thus, the California medical records and letters are inadmissible unless petitioners can establish that the evidence qualified under an exception to the hearsay rule. MRE 802.

Petitioners argue that the California medical records and letters qualified as hearsay exceptions under MRE 803(4), which states as follows:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Petitioners claim that because the medical records contain statements that the decedent made to his doctors for purposes of diagnosing his condition, the records should be admitted. However, assuming that these records contain statements by the decedent that would themselves qualify as exceptions to the hearsay rule under MRE 803(4), petitioners must also show that the medical records themselves qualify under an exception to the hearsay rule. MRE 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.").

Petitioners argue that the medical records qualify under MRE 803(6), which provides as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record,

> or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Petitioners have not offered any evidence that the medical records would qualify under this rule, because they have not provided any testimony from the "custodian or other qualified witness, or by certification" as required by the rule. MRE 803(6). Although petitioners argue that the trial court should have granted them a continuance to provide such testimony, they did not request this below. Rather they argued that they had "no way of formally authenticating them in the normal sense." Indeed, petitioners' counsel argued it would be "impractical" to either bring "someone here from California" or "for . . . several attorneys . . . to fly out to California to take depositions in order to certify." It was because of this asserted "impracticality" that petitioners sought to have the medical records and letters admitted under MRE 803(24).

With respect to the opinion letters from the decedent's three California doctors, there was no evidence or testimony that these documents were prepared as records of a regularly conducted business activity. Indeed, it appears that they were prepared not as part of any record keeping function but specifically for this case.

MRE 803(24) provides as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The trial court did not abuse its discretion when it refused to admit the medical records and letters under MRE 803(24) because they were not "more probative on the point for which [they were] offered than any other evidence that the proponent can procure through reasonable efforts." To illustrate, the petitioners could have deposed the California doctors that treated the decedent. If the medical records and letters are more probative under the circumstances present here, that is only because petitioners have failed to pursue the matter. In other words, it is their own inactivity that elevates the prominence of these documents with respect to their claims.

Accordingly, because the medical records and letters are hearsay and no exception applies, the trial court did not abuse its discretion in ruling that the documents were inadmissible.

As for the deeds, petitioners argue that the trial court abused its discretion when it ruled that the deeds were inadmissible. However, petitioners expressly conceded that whether the deeds were valid was an equitable concern for the bench, not the jury. Moreover, petitioners discussed the deeds at trial, including cross-examining the attorney who prepared the decedent's will about them. Further, nothing on the face of the deeds themselves addresses the competency of the decedent. Petitioners argue that the signature on the third and final deed appears illegible. However, the appearance of the final signature simply does not address the testamentary capacity of the decedent when the will was executed, especially where the final deed was signed months after the will. Petitioners' argument that the quality of any of the signatures demonstrates the mental capabilities of the decedent is entirely speculative. Indeed, signatures can appear illegible due to countless factors, such as physical difficulties, haste, or even sloppy handwriting.

Petitioners also argue that the deeds were essential to attacking the credibility of respondent and the attorney who drafted the will. However, petitioners' credibility argument below concerned the circumstances of signing the deeds rather than the face of the deeds themselves. There is no indication or argument that the trial court barred petitioners from presenting evidence regarding the circumstances surrounding the signing of the deeds.

III. GREAT WEIGHT OF THE EVIDENCE

Petitioners next argue that the trial court erred in denying their request for a new trial or judgment notwithstanding the verdict (JNOV) on the ground that the verdict was against the great weight of the evidence. Again, we disagree.

A. Standard of Review

A motion for a new trial on the grounds that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion, and substantial deference is given by this Court to the trial court's ruling that the verdict was not against the great weight of the evidence. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). "This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

B. Analysis

A testator has testamentary capacity when he is "'[1] able to comprehend the nature and extent of his property, [2] to recall the natural objects of his bounty, and [3] to determine and understand the disposition of property which he desires to make.'" *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001), quoting *Estate of Vollbrecht v Pace*, 26 Mich App 430, 434; 182 NW2d 609 (1970) (additional citations omitted). Whether a testator had the requisite testamentary capacity "is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution." *In re Powers Estate*, 375 Mich 150, 152; 134 NW2d 148 (1965).

Petitioners argue solely that the decedent was unable to comprehend the nature and extent of his property. They do not argue that he could not recall the objects of his bounty or understand that he was making a will. Although the decedent did not recall before making the will that he owned certain property in Oscoda with petitioner Diane Chambers, the record shows that he learned otherwise before executing the will. Specifically, he executed a quitclaim deed on the same day that he executed the will, which noted that Chambers owned 50 percent of the Oscoda property.

Moreover, a decedent is not required to have testamentary knowledge but testamentary *capacity*. See *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953) ("Weakness of mind and forgetfulness are . . . insufficient of themselves to invalidate a will."). The fact that the decedent did not recall some bank accounts before the will was executed simply does not demonstrate that he lacked the ability to comprehend the nature and extent of his property. Were this Court to accept petitioners' argument, then a will could be set aside merely by showing that a testator had forgotten about any portion of his property. The fact that residuary clauses are common in wills demonstrates, in part, that a testator is not normally expected to be able to recite all assets that he owns when making a will.

In any event, the jury heard testimony from the attorney who drafted the will that the decedent appeared competent to execute it. Although petitioners question her credibility on appeal, "[t]he jury is the judge of the credibility of witnesses and the truthfulness of their statements. It has the benefit of the testimony and its determination is final." *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, & Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005). Accordingly, because it cannot be said that the evidence clearly preponderates in favor of petitioners' position, the trial court did not abuse its discretion when it denied petitioners' request for JNOV or for a new trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette